AUG 23 1974

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5520

MARGARET MAE CANTRELL, *et al.*,

Petitioner,

v.

FOREST CITY PUBLISHING CO. a corporation, JOSEPH ESZTERHAS and RICHARD T. CONWAY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

REPORTS OF OPINIONS BELOW

The Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit is reported in 484 F.2d 150, and was entered September 10, 1973, reversing judgment entered on special verdicts for petitioners in the United States District Court for the

Northern District of Ohio, Cleveland, Ohio, in Civil Action No. 68-162, on September 14, 1972. Motions of respondents for judgment n.o.v. or new trial were denied in the District Court on October 13, 1972. Notice of Appeal to the Court of Appeals was filed November 10, 1972.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Section 1254(1). Petition for writ of certiorari, together with motion for leave to proceed in forma pauperis pursuant to 28 U.S.C.A. 1915 and Supreme Court Rule 53 were lodged September 26, 1973. The writ of certiorari was granted July 8, 1974 and leave granted concurrently to proceed in forma pauperis.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the personal right of privacy as evolved from the "penumbral" provisions and implications of the First, Fourth, Fifth and Ninth Amendments, inter alia, of the Constitution, and the laws of privacy of West Virginia and Ohio as recognized by their highest courts; and the First Amendment freedom of the press provision as violating same.

The First Amendment's "right of the people peaceably to assemble", (as applied herein to the Cantrell family in their private home) is set forth in U.S.C. Constitution, page 319, n. 14.

The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers and effects, . . ."; and its application to the within case is asserted on the decisional bases set forth in U.S.C. Amendment 4, p. 361, notes 23 and 1144.

The Fifth Amendment's prohibitory clause: ". . . . .nor be deprived of life, liberty, or property without due process of law"; as set forth in U.S.C. Constitution, Amendment 5, p. 418, and herein asserted as applicable as interpreted in cases cited under note 42.

The Ninth Amendment's mandate that: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people", as set out in U.S.C. Constitution, Amendment 9, is made applicable to the within case by decisional interpretation set out in note 4a of the 1974 pocket part, *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705.

The Seventh Amendment's protection of petitioners' right to trial by jury, and its assurance that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law", as set out in U.S.C. Constitution, Amendment 7, p. 696, is made applicable to the within case by notes 201 and 203, where, as here, the jury found that the publication was knowingly false or in reckless disregard of truth or falsity, constituting malice as defined in *New York Times v. Sullivan*, if the same were in fact here controlling.

QUESTIONS PRESENTED FOR REVIEW

I. In a diversity suit asserted on West Virginia right of privacy law as well as on Ohio's right of privacy law, where the complained of invasion consisted of the physical, uninvited and unforgiven intrusion by respondents into the private and secluded home of petitioners, neither of whom were public officials or public figures, and in the absence of the mother, Margaret Mae Cantrell, the taking of uncomplimentary photographs (50) therein, several of which were thereafter published in a lengthy, illustrated, knowingly false and fictionalized Sunday feature story, emotionally distressing and humiliating to petitioners; should a jury verdict in their favor and judgment thereon be voided for lack of specific proof of malice? (Affirmed by Court of Appeals)

II. Is the "general right to privacy" of individuals–the "right to be let alone by other people"–no longer to be "left largely to the law of the individual States" as declared by the Supreme Court in *Katz v. United States*, 389 U.S. 347, 352?

III. Is the Seventh Amendment right to trial by jury in civil cases applicable in invasion of privacy cases involving intrusions, trespasses and physical acts other than mere knowing or reckless publication of false and fictionalized defamation of private citizens, including infants, other than public officers or public figures? (Denied in effect by the Court of Appeals)

IV. Does a knowingly false publication of an uncomplimentary and humiliating feature article not published on any newsworthy occasion and incorporating several of the embarassing photographs obtained

by trespass into the private home of petitioners, without invitation, and in the absence and without the knowledge or permission of the mother of seven infant family members, ranging in age from 2 to 17 years, wipe out petitioners' Constitutional and West Virginia "protected" right of privacy unless they otherwise proved malice in such publication? (Affirmed by the Court of Appeals)

STATEMENT OF THE CASE

On December 14, 1967, the Silver Bridge spanning the Ohio River between Point Pleasant, West Virginia, and Kanauga, Ohio collapsed, precipitating motor vehicles thereon and their occupants in twisting steel and crunching automobiles to the waters and banks below, with macabre loss of 44 lives and numerous injuries to survivors. One of the fatalities was Melvin Aaron Cantrell. His widow, Margaret Mae Cantrell, seriously injured in the wreckage of their automobile on the Ohio shore, survived. Another occupant of the ill-fated car was also killed. None of the seven children of the Cantrells, then ranging in age from 16 years to one year, were involved in the disaster.

Shortly prior to the August 4, 1968 knowingly false publication involved herein, respondents Joseph Eszterhas, then a reported, and Richard T. Conway, a photographer, both employed by the corporate respondent, Forest City Publishing Co., without invitation or knowledge of Mrs. Cantrell or of any other member of the family, came upon the land and entered the home of the Cantrell family, and in the absence of Mrs.

Cantrell, admittedly took 50 photographs of the children and of the premises; and Eszterhas (who did not testify on trial or by deposition) assertedly "interviewed" the older of the children. On August 4, 1968, the Sunday supplement of the corporate respondent's Cleveland Plain Dealer carried the knowingly false feature article of several pages spread, entitled "Legacy of the Silver Bridge", fictionalizing conversations with Mrs. Cantrell, falsely misrepresenting the facts of the disaster as related to Mrs. Cantrell and her husband, and cruelly reflecting on the little Gallipolis Ferry, West Virginia home, possessions, appearances and condition of the Cantrell family and children. The theme of the publication was to make of the "statistic" of Melvin Aaron Cantrell, and his demise a featured "microcosm of the scar which will remain permanent and stark upon the spirit of people . . ." of Appalachia, the "hillbillies", that is, who lived there, and who "had little to live for and had little they owned . . ." who "had wives and children, and that's all they had".

Several of the 50 photographs taken were reproduced in the article, all of those published depicting the children and the Cantrell home as being most pathetic, dirty, uncared for, and neglected.

There was no news event or occasion for the uninvited intrusion into the private home and lives of the Cantrell family; and the sole intent of the respondents was to create a feature article for the interest of their reading public. (A vol. I, p. 62, 75)

The knowlingly false and fictionalized article was so offensive to the community as to provoke editorial and frontpage criticism in a local publication, inter alia. (A.

Plaintiff's Exhibit 7, Defendants' Exhibit 1) The children were embarassed at school and in public. (A. vol. 1, p. 29)

The District Judge had sustained motions to dismiss as to the six youngest children on the basis that they were too young to have suffered humiliation or emotional trauma; and rejected the claim for punitive or exemplary damages prior to submitting to the jury the following special verdicts, to which the jury returned the answers presented:

"Special Issue No. 1: Do you find from a preponderance of the evidence that the defendants, Joseph Eszterhas, Richard T. Conway and Forest City Publishing Company, or any combination of said defendants, invaded the privacy of the plaintiffs, or either of them, within the definition or instruction of the Court?

"Answer: Yes.

"If you have answered Special Issue No. 1 yes, and only in that event, then answer the following Special Issue No. 2.

"Special Issue No. 2: Designate the defendants that invaded the privacy of the plaintiffs or either of them.

"Answer: Joseph Eszterhas–yes. Richard T. Conway –yes. Forest City Publishing Company–yes.

"If you have answered Special Issue No. 2 in the affirmative, and only in that event, then answer Special Issue No. 3.

"Special Issue No. 3: Designate the plaintiff (238) or plaintiffs whose privacy was invaded by the acts of the defendant or defendants.

"Answer: Margaret Mae Cantrell–yes. William David Cantrell–yes.

"If you have answered Special Issue No. 3 in the affirmative, and only in that event, then answer Special Issue No. 4.

"Special Issue No. 4: If your answer is affirmative to either one of Special Issues No. 1 and 3, in what amount, if any, measured in dollars and cents, do you find from a preponderance of the evidence that the individual plaintiffs were damaged?

"Answer: Margaret Mae Cantrell, $45,000, William David Cantrell, $15,000.

"The six jurors must agree on each answer, affirmative or negative, that you give to each of the above special issues.

"Verdict of the jury: We, the jury, have answered the above and foregoing special issues as herein indicated and herewith return the same into court as our verdict. Foreman of the jury, Alfred Lesti."

Members of the jury, is this your verdict?

(239) (The jurors indicate it is their verdict.)"

In instructing the jury, the District Court had said (A. Vol. I, p. 103):

> "Thus if it be your conclusion and determination that plaintiffs have failed to prove by a preponderance of the evidence that defendants invaded the privacy by publishing a report or article about them with knowledge of its falsity or in reckless disregard of the truth, you need not deliberate further and you will return a verdict in favor of the defendants".

On September 14, 1972, the District Court entered judgments on the verdict, and on October 13, 1972 an order was filed denying the defendants' motion for a judgment non obstante veredicto or in the alternative for a new trial. The defendants appealed to the United

States Court of Appeals for the Sixth Circuit on November 10, 1972. The Opinion and Judgment of the Court of Appeals reversing the District Court judgment and remanding for entry of judgment for the defendants was filed September 10, 1973. This petition for certiorari was forwarded to the Clerk of this Honorable Court on September 24, 1973, together with a motion for leave to proceed in forma pauperis upon the original record, and the appendices accompanying the brief and reply brief of the defendants in the Court of Appeals.

Federal jurisdiction in the District Court was asserted on the basis of divessity of citizenship and an amount in controversy in excess of Ten Thousand Dollars for each plaintiff, exclusive of interest and costs. Jurisdiction was admitted.

SUMMARY OF ARGUMENTS

A. The Questions involved are substantial and require resolution by this Honorable Court; so as to obviate further lower court confusion and conflict arising from decisions herein involving the judicially expanded First Amendment rights of publishers, in relation to the right of a private person "to be let alone", described by the late and revered Justice Louis D. Brandeis as "the right most valued by civilized men". (1928):

Under the holding of the Court of Appeals, the subsequent publication of even a knowingly false, fictionalized feature article, unconnected with any current newsworthy event, concerning private persons in their private home, after entry therein by uninvited

trespass, during which trespass the publisher's photographer took 50 uncomplimentary and embarassing photographs of the seven minor children in the absence and without knowledge or permission of their widowed mother; that nevertheless such publication, including several of the photographs, bring into play the *New York Times v. Sullivan* extension of the First Amendment's guarantee of freedom of the press so as to supercede petitioners' right of privacy under such circumstances. Such holding conflicts with decisions of the Supreme Court.

B. The case is of great importance in the "expanding law of invasion of privacy", in that the decision of the Court of Appeals in effect encourages unwanted and uninvited invasions by intrusion, deception and trick into the private homes of private persons by uninvited and unwanted photographers and reporters whose publisher can, under the holding of the Court of Appeals, assure them immunity from answerability in damages by merely publishing the purloined, twisted and fictionalized product of their intrusive invasion of such privacy.

C. The decision of the Court of Appeals enlarges the Constitutional rights of publishers beyond the holdings herein and to the point of eliminating the right of privacy of all persons even in their private residences, though they are neither public officers or figures nor involved in or part of any news event or timely matter of public interest.

D. The decision of the Court of Appeals in effect limits jurisdiction of the federal courts to make judicial inquiry or review, and holds that the judgments of the publishers must control in all cases catalogued by them alone as "newsworthy".

E. The decision of the Court of Appeals wipes out the right of victims of intrusive invasions of privacy to Seventh Amendment guarantee of trial by jury in civil actions asserted upon prevailing State laws and constitutions protecting such private rights.

F. The decision of the Court of Appeals ignores the established and accepted authorities such as Dean Prosser whose work on Torts, 3rd ed. p. 832 has been widely approved by our courts, citing the four separate torts involved in an invasion of privacy, such as are involved in the within case, namely: "(1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name and likeness"; 62 Am. Jur. 2d, Privacy, par. 1, 26. The Court of Appeals makes no distinction in cases based solely on publications and those involving uninvited physical intrusions into the private, personal homes of private persons, not incidental to any current news or matter of public interest, and resulting in unwanted and humiliating exposure by false, fictionalized and defamatory distortion of the very private home and personal circumstances of the petitioners.

G. The decision of the Court of Appeals ignores or misconstrues the holdings of *Curtis Publishing v. Butts*, 388 U.S. 130, 87 S. Ct. 1975; the "penumbral" privacy rights decisions of *West Virginia State Board of Education v. Barnette*, 319 U.S., 624, 63 S. Ct. 1178; *Stanford v. State of Texas*, 379 U.S. 476, 85 S. Ct. 506; and the "general right to privacy" holding of *Katz v. United States*, 389 U.S. 347, inter alia, as well as

negating the State laws of West Virginia and Ohio in the matter of physical intrusion of privacy cases.

H. The decision of the Court of Appeals fails to distinguish between the basic essentials of actions of defamation and those of invasion of privacy, holding that malicious untruths in either form of action must be established affirmatively by a plaintiff at trial; whereas even a truthful but improper exposure of private matters can give rise to an action for invasion of privacy; *Time, Inc. v. Hill*, 385 U.S. 374.

I. The decision of the Court of Appeals conflicts with the decisions of other Circuit Courts and with the decisions of the Supreme Courts of Ohio and West Virginia; *Young v. That Was the Week That Was*, etc., 423 F.2d 265; *Cordell v. Detective Publications*, 419 F.2d 989; *Housh v. Peth*, 165 Ohio St. 35; *Sutherland v. Kroger Co.*, 144 W.Va. 673.

CONCLUSION

J. For the foregoing reasons, it is respectfully urged that the judgment of the United States Court of Appeals for the Sixth Circuit be reversed and judgment of the District Court on the jury verdict be ordered reinstated.

ARGUMENT

I.

FREEDOM OF THE PRESS IS SUBJECT TO COMPLIANCE WITH LAW

Myopic proponents of absolutism in freedom of the press would preempt for any individual, group or corporate publishers, sole right and power to judge journalistic values, regardless of their journalistic objectives. They assume either that every publisher is motivated to seek and air truth, or that a sinner among them will always be exposed by others sharing that absolute right and power. Only through such absolute freedom of the right to publish, it is argued, can a "free society" be maintained. Without such absolutism of right and power in a free press, a "free people . . . . could not long remain free," declares Senator Alan Cranston (California) in his article, First Means First, Trial Magazine, May/June 1973, p.31.

To paraphrase Shakespeare, "with itself in either eye . . ." even the First Amendment's guarantee of freedom of the press can assume so disproportionate a stature as to obliterate from logic's view equally essential rights implicit in freedom. Not the least of cynics would deny justice its historic role in the pattern of our societal fabric. A classic example of resolution of a conflict resulting from an uninhibited, journalistically oriented assertion of First Amendment privilege on the one hand and the societal or public interest in justice based on truth, is the decision of this Honorable Court in *Branzburg v. Hayes*, 408 U.S. 679. "The use of

confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law." (408 U.S. 681-682)

Even the practice of religion is not guaranteed absolute, self-interest license by the First Amendment. Obviously, though it be mandated by a religious concept, cannibalism would require the restraint of our law, based as it is on the right of each person to life, liberty and the pursuit of happiness.

As this honorable Court has sagely observed: ".... power, once granted, does not disappear like a magic gift when it is wrongfully used ..... .Accordingly, as our cases make clear, the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen. It guarantees to the citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief". *Bell v. Hood*, 327 U.S., at 684.....; see *Bemis Bros. Bag Co., v. United States*, 289 U.S. 28, 36.....; The Western Maid, 257 U.S. 419, 433....."; *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc.*, 91 S. Ct. 1999, 403 U.S. 388.

The Fourth Amendment is not of course directed solely against the federal government. It provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against un-

reasonable searches and seizures, shall not be violated".

The United States Department of Justice in Bivens had argued that the rights of privacy are creations of state and not of federal law, and that only a state action in tort was available to the plaintiff. The Supreme Court rejected the argument, saying (p. 2002):

> "We think that respondents' thesis rests upon an unduly restrictive view of the Fourth Amendment's protection against unreasonable searches and seizures by federal agents, a view that has been consistently rejected by this Court" ....."And our recent decisions regarding electronic surveillance have made it clear beyond peradventure that the Fourth Amendment is not tied to the niceties of local trespass laws. *Katz v. United States*, 389 U.S. 347 .....; *Berger v. New York*, 388 U.S. 41 .....; *Silverman v. United States*, 365 U.S. 505, 511 ....."

Does a private citizen have greater right to invade the privacy of another private citizen that does the federal government? Even though such invasion were expressly authorized by State law, the Fourth Amendment prevents such trespass; *Gambino v. United States*, 275 U.S. 310; *Byars v. United States*, 273 U.S. 28; *Bivens, supra.*

Uninvited, unauthorized violations of one's person, home, property and other private, lawful rights offend both state and federal law.

Nor may states or state agencies ignore the Fourth Amendment's mandate; *Mapp v. Ohio*, 367 U.S. 643.

The protection of the Fourth Amendment is forcefully asserted in all cases where governmental violation involves any physical trespass into the

"protected zone"; *Olmstead v. United States* 277 U.S. 438; *Silverman v. United States* 365 U.S. 505; *Regalado v. California*, 374 U.S. 497; *Clinton v. Virginia*, 377 U.S. 158; *Chapman v. United States*, 365 U.S. 610.

All of the foregoing citations, of course, deal with Fourth Amendment protections in criminal cases; for obviously "unreasonable searches and seizures" are committed during official governmental law enforcement proceedings. However, the rights of privacy are equally guaranteed in our civil law.

The respondent publisher apparently seeks to obtain judicial termination of the right of privacy entirely.

The *Plain Dealer* justifies the actual, uninvited, intentional trespasses into the home and effects of the Cantrell family by its former reporter, Eszterhas (who ignored notices to be deposed in advance of trial, and who, though personally served, made no appearance at trial) and of its photographer, Conway, on the sole premise that the material thus acquired, though substantially fictionalized in its feature article was of "public interest". Even the asserted "public interest", admittedly is secondary to the newsworthiness of the Silver Bridge disaster eight months earlier. No news "happening" attracted the trespassers on the occasion of their unannounced visit.

Not a single photograph, however, in the fictionalized feature spread of August 4, 1968, was of the Silver Bridge, or the scene of the disaster. The article was not newsworthy in any sense whatever; not a single Cantrell child was at the site of the bridge fall on December 14, 1967; nor was any part of the news stories relating to same; nor was the Cantrell home (miles away from the Silver Bridge) implicated therein. Yet the publisher would justify the trespass into the private home and

lives of this family on the "public interest" extension of Sullivan. Because Melvin Aaron Cantrell was, by the tragedy of the previous December projected into the news and into eternity, respondents argue that his family's supposed private moods, thoughts, tastes, habits, dress and dreams, and their home became public property. Respondents urge that uninvited, uninhibited and highly imaginative reporters, fiction writers, and camerámen, have a constitutionally protected right to expose the Cantrells, without permission, to ridicule, embarrassment and humiliation by a highly fictionalized feature article whenever the spirit (or desire for economic gain) moves them so to do. To paraphrase the 23rd Psalm, respondents in effect assert that they have a right "... to dwell in the house of Cantrell forever".

Anointed by the Supreme Court with the spreading oil of Sullivan immunity from legal liability for false publication in some circumstances, the *Plain Dealer* now declares its own, private right to an absolute privacy from the eyes of the law, no matter the nature of its trespasses, or the scope or target of its lies. It sees itself as above and beyond the law's reach. It may, it believes, ignore totally the historic "sanctity" of home and family. It may, if it choose, crucify truth. Its so recently declared "immunity" is already conceived and translated by it into "impunity". Who can now gainsay its reporters and cameramen entry into one's home? Who dare deny an Eszterhas access to a closet?; or to indulgence in his flights of fancy as substitute for fact; or his joy in mocking the dead and falsely labelling and demeaning the living? The Cantrells may close their windows and doors to shut out the winds and weather and storms; but no longer is their home a "castle"; no

longer may they maintain locks which may interfere with even uninvited "literary" pursuit. New kings are born that can do no wrong!; a royalty for profit and power without legal or moral restraint!; and supposedly ordained by the First Amendment to the Constitution! A logical sequel to such interpretation of the Constitution would be that any reporter, writer or cameraman who is denied entrance to one's home in similar circumstances may claim damages for interference with a Constitutionally guaranteed federal right!

The Supreme Court, in *Watkins v. United States* 354 U.S. 178, recognizes the right to privacy, stating:

> "There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. . . . . No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators, or to 'punish' those investigated, are indefensible.
>
> "Clearly, a Congressional investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by lawmaking.
>
> "We cannot simply assume . . . that every Congressional investigation is justified by a public need that over-balances any private rights affected. To do so would be to abdicate the responsibility placed by the Constitution upon the judiciary to

> insure that the Congress does not unjustifiably encroach upon an *individual's right to privacy*, nor abridge his liberty of speech, press, religion or assembly."

In this important 1957 decision, the Supreme Court thus takes judicial notice of an "individual's right to privacy" in non-criminal proceedings of even the highest public order.

Particularly as it relates to the methods employed in news gathering by mass media of today, it is interesting to note the prophetic observation of Samuel D. Warren and Louis D. Brandeis, in 1890, in their article, "The Right To Privacy", published in the Harvard Law Review: (4 Harv. L. Rev. 193):

> "Instantaneous photographs and newspapers' enterprises have invaded the sacred precincts of private domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house top.' "

What were still frightening prospects 84 years ago, before the advent of telestar, computers, electronic eavesdroppers, recording devices, and the modern presses, radio, television and air-freight distribution now employed by the publishing industries, are stark, brutal realities of today. The "threat" to "invade the sacred precincts of private and domestic life" has too often been outrageously carried out; and only the law of privacy as enforced in our courts stands between the personal right to "freedom" of the individual and the growing and self-engorging "power" of the press.

How Mrs. Cantrell managed her seven children, difficult though it may have appeared to outsiders, was, so long as she violated no law in so doing, strictly

her private affair. The Supreme Court had long ago recognized a mother's right to the "care, custody, management and companionship of her minor children", as being "rights far more precious than property rights"; *May v. Anderson*, 345 U.S. 535; and almost 50 years prior to the invasion of the Cantrell privacy, in *Meyer v. Nebraska*, 262 U.S. 390 (1923) the Supreme Court had declared that the due process clause protected the right "to marry, establish a home and bring up children".

The curiosity of the *Plain Dealer*, its reporter and photographer, and the literary appetites of their reading public could not warrant exposure of the family's private life in the circumstances; a fortiori, where trespass, fictionalization and bizarre distortion of the publication visited upon them extended humiliation.

In *Wisconsin v. Yoder*, 406 U.S. 205, the Supreme Court reaffirmed the right of the "plain people" to be let alone.

II.

THE DECISION OF THE COURT OF APPEALS GROSSLY RESTRICTS THE RIGHT OF PRIVACY.

The learned Court of Appeals for the Sixth Circuit has by its holding dangerously narrowed the right of privacy while unwarrantedly expanding the First Amendment rights of publishers. "Only in cases of flagrant breach of privacy which has not been waived or obvious exploitation of public curiosity where no legitimate public interest exists should a court substi-

tute its judgment for that of the publisher" as to "newsworthiness", says the Court at page 11 of its official opinion. Apparently the Court ignores what it deems to be unimportant violations of law by reporters in such "newsgathering"; and would, contrary to the parameter of lawfulness mandated by *Branzburg v. Hayes*, 408 U.S. 679 in such professional endeavor, equate violation of the right of privacy by uninvited intrusion into one's home on a par with violation of one's private preference to be free from unwanted publicity, as in simple "false light" privacy cases, involving no physical trespass into private residences or premises. Moreover, the Court of Appeals wrongfully assumed that petitioners' right of redress in even a simple "false light" invasion of their privacy by mere publication would have been controlled by *New York Times v. Sullivan*, 375 U.S. 254, disregarding the distinction between public officers, public figures and private citizens not seeking a public forum or other publicity; *Elmer Gertz v. Robert Welch, Inc.* ___ U.S. ___ (decided June 25, 1974)

Perhaps the most devastating effect of the decision of the appellate court is its declaration that the law must give preference to publishers' First Amendment rights over the right of privacy of persons, declaring: "When an invasion of privacy involves publication, the First Amendment must be considered and a mere balancing of rights will not suffice. If there are preferred positions among the rights guaranteed by the Bill of Rights, certainly such priority attaches to freedom of speech and the press rather than to the less explicit and less well defined right of privacy". (page 9 of its official opinion)

Neither the Constitution nor the Bill of Rights guarantee the right to life or define pursuit of happiness. Does such omission mean that henceforth personal freedom does not include such rights? Or must life or personal choice of occupation give way to privileged professions named in the Bill of Rights? Can a reporter kill to obtain news, since the Bill of Rights omits reference to a person's right to live?

Apparently the appellate court was unimpressed by the opinion of the late Justice Louis D. Brandeis who declared: "The right to be let alone is the right most valued by civilized men", *Olmstead v. U.S.* 277 U.S. 438; and the learned Court of Appeals overlooked or misconstrued important guidelines laid down by the Supreme Court which has repeatedly pointed out that the entire Bill of Rights was to be judicially regarded as a bulwark to protect rather than to diminish the right of privacy.

". . . . the First Amendment has a penumbra where privacy is protected from governmental intrusion. . . . . The right of 'association', like the right of belief (*West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178), is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment, its existence is necessary in making the express guarantees fully meaningful". *Griswold v. State of Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 1681.

In *Stanford v. State of Texas*, 379 U.S. 476, 85 S. Ct. 506, the Supreme Court had earlier pointed to the "penumbral" guarantees of privacy implicit in the First, Fourth and Fifth Amendments. These guarantees include freedom of conscience and *protection of human dignity*.

III.

PRIVACY IS AS FUNDAMENTAL TO FREEDOM AS A FREE PRESS

The *right* of privacy is of course the very bedrock of personal liberty. While society is formed by men, a free society is clearly formed for man.

"Man alone can freedom know;
by men 'tis not possessed.
Nor on man can men bestow
The instinct which sets hearts aglow
and pulsing in each human breast."

Life itself is quite personal; and in America at least, freedom is its birthright.

Neither the law nor even the Constitution grant man life or freedom. Their great function is to make secure the natural treasures of life and freedom.

It is quite evident that without social order, defined by a Constitution and secured by law, that man's personal, natural rights, may easily be rendered allegorical.

The agencies of government set up by Constitution and laws are intended to assure man's birthrights. The judicial branch of government has often come to grips with the apparent conflict between the natural rights of

man and those of the social order created to protect them. Obviously, it is to man's interest to maintain a strong and effective society within the framework of its Constitution and political laws; but the social strength is to be directed against the erosive assaults which intentionally or unintentionally weaken man's natural rights. For if the most perfect of governmental structures were to become self-perpetuating and impervious to man's individual, personal rights and needs, its reason for existence would have been forfeited.

Freedom of speech is but one of the aspects of freedom of man. Freedom of the press was not Constitutionally thought of in terms of modern corporate, national and international commercial enterprises. When written into the Bill of Rights, it was to protect man as a writer of his thoughts, his dreams, his hopes, his aspirations or his criticisms, whether acceptable or not to his government or to other free men with like right of expression. The medium of such expression, whether individually owned or the property of impersonal commercial entities, relates rather to the reading forum for the free expression than to the right thereof; therefore, the qualified privilege claimed as defense by the corporate owners of the mass media is valid only to the extent they do vicariously become invested with the protected natural right of free expression of the writer, and accommodate such free expression. Moreover, the privilege that is enjoyed by the publisher is prompted by the biblical admonishment that "The Truth shall make you free"; and not by any exception to the basic personal right of the individual to freedom. The interchange of ideas in man's search for Truth, is ideally to be encouraged by the privilege.

"The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others"; *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S. Ct. 1975, 1989; *Associated Press v. N.L.R.B.*, 301 U.S. 103, 132-133.

The currency of the *Butts* law is pertinent, because it follows the landmark case of *New York Times Company v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, which seemed to project newspapers into the untouchable area of practising religions.

Having caught our wind, as we recovered from the initial impact of Sullivan, we find man still ensconced securely in his heritage of freedom, with only the rights of his public officers and of those who would influence direction of public action redefined. By their very nature, public officers are not private citizens treating with private property by private means. And "public figures" are persons who voluntarily surrender their privacy to assume their roles in public domains. Ergo, their *right* of privacy is surrendered by choice of an alternative.

The Supreme Court reminds all in a post-Sullivan case that freedom of speech, the correlative of freedom of the press, does not include the right to trespass on the property of others, including the property of the public; *Adderley v. State of Florida*, 385 U.S. 39, 87 S. Ct. 242.

Since Sullivan a number of other clarifying decisions have reassured private citizens as to their right of privacy, and to their historic property right in their good names and reputations.

The late and revered Justice Michael Angelo Musmanno, of the Pennsylvania Supreme Court in *Purcell v. Westinghouse Broadcasting Co.*, 191 A.2d 662, 411 Pa. 167, said:

> "A man's good name is as much his possession as his physical property. It is more than property, it is his guardian angel of safety and security, it is his lifesaver in the sea of adversity, it is his parachute when he falls out of the sky of good fortune, it is his plank of rescue in the quicksand of personal disaster".

The *Purcell* decision also recalls with approbation the guidelines promulgated by Chief Justice Bell in the case of *Bogash v. Elkins*, 405 Pa. 437, 439:

> "Freedom of speech is one of the most prized rights of every American, but is not absolute ..... every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. Article I, sec. 7 of the Constitution of Pennsylvania".

The free press is intended to aid man in his judgments, his private determinations, opinions, shaping of values and choices in self-satisfactions from the many options open to his "pursuit of happiness" as well as to help mold his thinking on public issues, events and persons "ordering" or attempting to order his society.

Man's right of privacy on the other hand is his right to be let alone, and his right to live his life without being subjected to unwarranted and undesired publicity; his right to live without interference by the public; his right to bar the idle, the curious, the scandalmongering, the trespassers or others uninvited, be they individuals, institutions or society itself, from his private life, love

and habits as a private citizen and from his family and home, so long as he and they do not become public officers or public figures, and do not themselves seek the publicity; *Souder v. Pendleton Detectives, Inc.*, 88 So.2d 716; *Aquino v. Bulletin Co.*, 190 Pa. Super. 528; *Appeal of Mack*, 386 Pa. 251; *Jenkins v. Dell Publishing Co.*, 251 F.2d 447, 3 Cir.; *Bennett v. Norban*, 396 Pa. 151; *Afro-American Publishing Co., Inc. v. Jaffee*, 366 F.2d 649.

IV.

RIGHTS OF PRIVACY ARE GUARANTEED IN OHIO AND WEST VIRGINIA

A right of action for invasion of privacy has long been recognized in Ohio; *Housh v. Peth*, 165 Ohio St. 35; *Cordell v. Detective Publications*, 419 F.2d 989 (6th Cir. 1969); *Young v. That Was The Week That Was*, etc., 423 F.2d 265.

Likewise in West Virginia; *Sutherland v. Kroger Co.*, 144 W.Va. 673, 684, 685; 47 Am. Jur. Searches and Seizures, 73; *Roach v. Harper*, 143 W.Va. 869; *West Virginia State Board Of Education v. Barnette*, 319 U.S. 624; *Copley v. Northwestern Mut. Life Ins. Co.*, 295 F.S. 93.

Of course, the historic "recognition" of the rights of privacy by both States, would not, it is respectfully submitted, give them power to abolish those rights of individual citizens, in view of the Fourteenth Amendment's reach, imposing the mandate of the Constitution's Bill of Rights upon all of the States; although the

Supreme Court, in *Katz v. United States*, 389 U.S. 347 said:

> "What a person knowingly exposes to the public, even in his own home or office, is not a subject of constitutional protection . . . The protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual states."

V

PUBLIC OFFICIAL, PUBLIC FIGURE, AND PUBLIC INTEREST EXPANSIONS OF THE SULLIVAN RULE HAVE NOT NEGATIVED THE RIGHT OF PRIVACY

The United States Supreme Court, post-Sullivan, has used these reassuring words with approval:

> "Words defamatory of another are still placed in the same class with use of explosives or the keeping of dangerous animals; Prosser, Torts, par. 108, p. 792. . . . ."
> *Curtis Publishing Co., v. Butts*, 388 U.S. 130

Simultaneously with its reaffirmation of the foregoing classic principle, in *Butts*, it reversed a large defamation verdict won by retired General Walker, in *Walker v. Pulitzer Publ. Co.*, 388 U.S. 164, 87 S. Ct. 1996, by finding him to have been by his own choice a "public figure" whose conduct invited the attention of news media, including possible incidental and unintentional untruths in reporting of same.

After having warned publishers in *Butts*, that:

"Neither the interest of the Publisher nor those of society necessarily preclude a damage award based on improper conduct which creates a false publication. . . . .and calculated falsehood places the publisher at odds with the premises of democratic government and with the orderly manner in which economic, social or political change is to be effected . . . . ."
Butts, 87 S. Ct. 1990;

thus, emphasizing that CALCULATED FALSEHOOD is still not privileged even as to a "public figure"; nor is it privileged as to public officials if published maliciously (with the new, and not here pertinent definition of malice, requiring "reckless disregard of the falsity"); yet the high Court in *Walker* expanded the Sullivan doctrine, into the hegamonies of as yet undefined "public or social interest and activity". Because General Walker had "thrust himself into the vortex" of an important public controversy, and "both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able to 'expose through discussion the falsehood and fallacies' of the defamatory statements, he was declared to have purposefully assumed status as such a "public figure" concerning whose activities and expressions on the public issue, the people were entitled to be informed. If, as he contended, he was defamed by untruths, he could only complain in the civil courts if the untruths were calculated and not error in fact or judgment, or if they were published on improbable and not the usual, reliable authority.

Apparently anticipating the query "When is a person a public figure, so as to shed his birthright and Constitutionally protected privacy?", Chief Justice

Warren suggests the classification include those who "play an influential role in ordering society", and who become "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in the area of concern to society at large"; 87 S. Ct. 1996.

Measured against these vague touchstones, plaintiffs stand well out of the newly designated zone. None were "involved in the resolution of any public question"; and none was famous in any field of endeavor where he or she could or did "shape events. . . of concern to society at large"; nor, indeed, did they play "an influential role in ordering society". Quite the contrary was true.

Certainly, it was never contended that any of the Cantrell family surviving Melvin Aaron Cantrell were public officials.

It was the lot of the Cantrell family to live in the unhurried, uncrowded, off-beat community of Gallipolis Ferry, in the foothills of West Virginia, completely private, completely contented, completely out of the searching cameras, spotlights and curious eyes of the reporters for news media, until the bridge disaster made the crushed remains of Melvin Aaron Cantrell a "matter of public interest", really "hot news". That was in December, 1967.

The uninvited, arrogant invasion of the Cantrell home, several months later, the unforgivable trespass upon the unsuspecting children, and the distorted, false and sensationalized publication exposing them to ridicule has no justification whatever in law. The United States Circuit Court of Appeals, for the Ninth Circuit in the case of *Dietemann v. Time, Inc.*, 449 F.2d 245 declares:

"Investigative reporting is an ancient art; its successful practice long antecedes the invention of miniature cameras and electronic devices. The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime.

Defendant relies upon the line of cases commencing with *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 84 S. Ct. 710, II L. Ed. 2d 686 and extending through *Rosenbloom v. Metromedia, Inc.* (1971) 403 U.S. 29, 91 S. Ct. 1811, 29 L. Ed. 2d 296 (1971) to sustain its contentions that (1) publication of news, however tortiously gathered, insulates defendant from liability for the antecedent tort, and (2) even if it is not thus shielded from liability, those cases prevent consideration of publication as an element in computing damages.

As we previously observed, publication is not an essential element of plaintiff's cause of action. Moreover, it is not the foundation for the invocation of a privilege. Privilege concepts developed in defamation cases and to some extent in privacy actions in which publication is an essential component are not relevant in determining liability for intrusive conduct antedating publication. (Cf. Nimmer, "The Right to Speak from Time to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy" (1968) 56 Calif, L. Rev. 935, 957). Nothing in New York Times or its progeny suggests anything to the contrary. Indeed,

the Court strongly indicates that there is no First Amendment interest in protecting news media from calculated misdeeds. (E.g., *Time, Inc. v. Hill*, supra, 385 U.S. at 389-390 and 384 n.9.)

No interest protected by the First Amendment is adversely affected by permitting damages for intrusion to be enhanced by the fact of later publication of the information that the publisher improperly acquired. Assessing damages for the additional emotional distress suffered by a plaintiff when the wrongfully acquired data are purveyed to the multitude chills intrusive acts. It does not chill freedom of expression guaranteed by the First Amendment. A rule forbidding the use of publication as an ingredient of damages would deny to the injured plaintiff recovery for real harm done to him without any countervailing benefit to the legitimate interest of the public being informed. The same rule would encourage conduct by news media that grossly offends ordinary men."

In *Varnish v. Best Medium Publ. Co., Inc.*, 405 F.2d 608, the defendant published an article in a March, 1964 weekly relating to a tragedy occurring in September, 1963, when the plaintiff's young wife killed her three infants and committed suicide. The article portrayed the suicidal wife as having been regarded in the community as the "happiest mother", whereas in fact she had been moody, dejected and depressed for some time. A suicide note which revealed her true state of mind was reported in the article in such manner as to omit reference to her despondency, in apparent design to depict the wife victim only as the "happiest mother". This distortion of fact made the story false. The article being "knowingly false" to the publisher was held to warrant a jury verdict based on invasion of

the husband's privacy, resulting in a compensatory and punitive damage verdict. In sustaining the verdict, the Second Circuit Court of Appeals observed that the murder-suicide occurring six months prior to the publication was a matter of public interest, nevertheless, because the plaintiff pointed out that the article contained fictionalized dialogue attributed to him upon discovery of the tragedy and did not accurately report the condition of mind of the despondent wife, the jury was warranted in finding the article "offensive to persons of ordinary sensibilities" and that the plaintiff's burden under *New York Times v. Sullivan*, 376 U.S. 254 to prove "intention or reckless falsity and offensiveness to persons of ordinary sensibilities" which "represent a proper balancing of the public interest in freedom of expression and the individual interest in privacy", had been met.

PUBLIC INTEREST

The Supreme Court in *Time, Inc. v. Hill*, 385 U.S. 374 held that the opening of a new play (although the play was based on an incident which occurred some three years prior to the article reporting the play's opening) was a matter of public interest, quoting, (p.388) from its own opinion in *Winters v. People of State of New York*, 333 U.S. 507, 510: "The line between the informing and the entertaining is too elusive for the protection of * * * (freedom of the press)", and remanding the case for determination as to whether errors of fact relating to the subject matter background of the play were "reckless falsity". While

the *opening of a new play* was the proper subject for a publication in the public interest, reportorial expansion of the fact of that event into the crime of three years prior thereto, containing error, put the publisher to the test of the *New York Times v. Sullivan* rule. It is to be noted, therefore, that public interest does not of itself cloak the publisher with immunity from liability for invasion of privacy in the unauthorized publication of an article and photographs relating to a person actually involved in an antecedent crime, which at the time of occurrence was unquestionably "hot news" and, as such, a proper subject of public interest in which area the free press has its widest latitude.

In *Time, Inc. v. Ragano*, 427 F.2d 219, the main article was concerned with *organized crime*, admittedly a subject of public interest; however, a photograph of the lawyer plaintiff (known to the publisher) in a group of figures and identified as criminals, was held to assert a proper cause of action for libel.

In *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, the plaintiff hotel had been the *headquarters of a golf classic* and therefore part of a matter of public interest, so as to require "reckless falsity" proof as part of plaintiff's libel case.

In *Wasserman v. Time, Inc.*, 424 F.2d 920 cert. den. 90 S. Ct. 1844, the District of Columbia Circuit reversed the District Court's summary judgment for the publisher and remanded for trial a libel action based on publication of a group photograph of persons called before a grand jury and who had themselves been released on $100,000 bonds, but which group included the plaintiff attorney, known as such to the publisher. Again the subject matter was obviously one of public

interest, and the publication of a "reckless falsity" was a question of fact for the jury.

In *Sellers v. Time, Inc.*, 423 F.2d 887, cert. den. 91 S. Ct. 27 it was held that an article based upon *filing of a lawsuit*, was of public interest so that accurate reporting thereon constituted a complete defense to a libel action, based on Pennsylvania law, without reference to the right of either party under the Constitution.

In *Rosenbloom v. Metromedia, Inc.*, 415 F.2d 892, cert. granted 397 U.S. 904, 403 U.S. 29 a libel verdict of $25,000.00 compensatory and $750,000.00 punitive (reduced) was returned in favor of a distributor of magazines and against a broadcasting company on the basis of a series of broadcasts in which repeated reference was made to "smut merchants". The Third Circuit Court of Appeals, accepting the District Court's conclusion that "certain of the statements in the two series were defamatory as a matter of Pennsylvania law and, in the circumstances created a jury issue under such law", reversed on the ground that the evidence lacked proof of "reckless falsity" or malice, saying: "Not only did the broadcasts under attack concern subject matter of public interest, but of equal significance they involved broadcasts of "hot news" items, i.e., summaries of the latest news given on the hour and the half hour in reports ranging from ninety seconds to ten minutes". The broadcasts dealt with *current police raids*; and the second series dealt with *institution and development of* a legal action by the plaintiff and two publishers of the news media (all major local newspapers and the local CBS-TV affiliate)

as well as against the City of Philadelphia, its Police Commissioner, and its district attorney.

In *Time, Inc. v. McLaney*, 495 F.2d 565, cert. den. 395 U.S. 922, the Fifth Circuit Court of Appeals after granting of the interlocutory appeal entered summary judgment which had been denied by the District Court, where the plaintiff, a reported organized gambling figure and operator, connected with an international crime syndicate, was assertedly involved in an election in the Bahamas where, inter alia, the operation was taking place. The Court of Appeals held as a matter of law that the subject matter was of public interest, concerning a public figure and that the "reckless falsity" or malice requirements of the *New York Times v. Sullivan* case applied.

The subject matter of *public health* was held to be a public interest in *United Medical Laboratories v. Columbia Broadcasting Sys.*, 404 F.2d 706, cert. den. 397 U.S. 904 so as also to necessitate proof of "reckless falsity" or malice in publication.

It is thus seen that the areas of public interest include "hot news", opening of a play, organized crime, filing of litigation, political matters, and public health. Certainly there are many other areas which can properly be brought into the public interest, so as to be outside the realm of privacy; however, within its protected circle, all who venture uninvited must do so at their peril.

"That which is interesting to the public may not always be in the public interest"; *Johnston v. Time, Inc.*, 321 F.S. 837, 853.

Query . . . . were the children and home of Margaret Mae Cantrell in August, 1968, outside the protected circle?

VI.

THE CANTRELL RIGHTS OF PRIVACY WERE NOT WAIVED IN FACT OR LAW.

The expanded First Amendment rights of publishers under the Sullivan et seq., doctrine give them no license to trespass and, without invitation, to intrude into the effects and premises of even public figures to obtain even truthful facts of public interest; *Dieteman v. Time, Inc.*, supra; and knowing, false reporting or fictionalizing of facts related to a matter of even public interest vitiates the qualified privileges of publishers, so as to warrant both compensatory and punitive damages for affected family members of deceased persons whose circumstances of death constituted "hot news" in the relatively recent but not current past; *Varnish v. Best Medium Publ. Co.*, supra.

A fortiori, where the uninvited trespass and intrusion is into the home of a non-public family member, and the resulting unprivileged publication is false, fictionalized and defamatory, are both compensatory and even punitive damages warranted; for TRESPASS IS NEVER PRIVILEGED, A LIE IS NEVER PRIVILEGED AND PUBLICATION OF EVEN TRUTH OBTAINED BY TRESPASS INTO PRIVATE PREMISES CONSTITUTES UNLAWFUL INVASION OF PRIVACY, in such circumstances.

Just as the thief cannot claim legal title to that which he steals, so an intruding and trespassing reporter can get no title or right in the private matters of another; ergo, he cannot pass on any better right to his publisher. In *Afro-American Publishing Co. v. Eli Jaffee*, etc., 366 F.2d 649, 654, the D.C. Court of Appeals states that for invasion of privacy: "An action is maintainable even when all the statements made therein are completely true and accurate.... The right of privacy stands on high ground, cognate to the values and concerns protected by constitutional guarantees"; *Cooley, Torts* (2d ed.); Interference with Privacy, *Restatement, Torts*, sec. 867; *Barber v. Time, Inc.*, 348 Mo. 1199; *Prosser, Torts*, (3rd ed.) sec. 112; *Tehan v. United States* ex rel. *Shott*, 382 U.S. 406.

The private problems of the Cantrell family, including the dirty face of two-year-old Bruiser, were their private rights just as much protected from uninvited exposure by the Fourth Amendment and by the law of privacy as were their private likes and their private thoughts and values. No constitutional power to condemn those rights in the "public interest" were granted to the press by the First Amendment.

Constitutional guarantees of freedom of press are still, primarily for the benefit of citizens generally, and not for the benefit of the press; in that such freedom is necessary to assure to the citizens continuity of an open society; *Time, Inc., v. Hill*, 385 U.S. 374; 87 S. Ct. 543.

Human dignity and conscience have their right to grow in whatever social soil they take root—even in the backward foothills of the mountain area of Gallipolis Ferry, West Virginia; *Stanford v. State of Texas*, 379

U.S. 476; and the public may not intrude through its highest officials; *Watkins v. United States*, 354 U.S. 178; no agency or group within the public, therefore can claim a greater right than the federal government itself, to represent such "public interest" as would in effect repeal the Fourth Amendment.

VII.

TIME, INC. v. HILL, 385 U.S. 374 IS ONLY PARTIALLY APPLICABLE

The appellants' brief, accompanying its post-trial motions below, acknowledged that: "The court correctly charged the jury on the test of *Time, Inc. v. Hill.*"

The admitted "occasion" for the Hill publication was not one that was created or fabricated by Time, Inc. or its reportorial staff; it was the opening of a new play on Broadway, and as such was newsworthy and of legitimate public interest. The complaint of the Hill family relied on their asserted civil rights under a New York statute hereunder referred to. The article was in nowise defamatory to the Hill family; contrariwise, it ascribed to them heroic acts and qualities not warranted by the facts. The historic, newsworthy event which projected the Hills into the area of public interest had, together with similar true experiences of others, inspired the playwrite to dramatize and embellish the situations into an intensely fictionalized theme incorporating non-factual elements of violence, lust and heroics first depicted in a best-seller book. That such "poetic license" is a legitimate attribute of creative writers cannot be questioned.

The convicts who had restrained the Hill family in their home, were depicted as cruel, lustful and mean, contrary to the facts in the actual Hill experience; and these elements of untruths, in no way reflecting adversely on the Hills, were the sole basis for charging falsity in reporting by Time, Inc.

Actually, were the Hills not "protected" by a statute of New York State requiring their consent in the use of their names, the case should have been dismissed as failing to establish an action for invasion of privacy. It was not dismissed, however.

The sole basis of the Hill suit against Time, Inc., was that under a New York Civil Rights statute, forbidding unauthorized commercial use of names or photographs of actual persons without their consent, their names were used in a "fictionalized" story of their experience without their consent. Aside from its title, the statute makes no reference whatever to the "right of privacy"; and it is particularly significant that, although urged by Time, Inc., so to do, the Supreme Court refused to hold the statute unconstitutional, saying (385 U.S. 396):

> "The appellant argues that the statute should be declared unconstitutional on its face if construed by the New York courts to impose liability without proof of knowing or reckless falsity. Such a declaration would not be warranted even if it were entirely clear that this had previously been the view of the New York courts. The New York Court of Appeals, as the Spahn opinion demonstrates, had been assiduous in construing the statute to avoid invasion of the constitutional protections of speech and press. We, therefore, confidently expect that the New York courts will

apply the statute consistently with the constitutional command. Any possible difference with us as to the thrust of the constitutional command is narrowly limited in this case to the failure of the trial judge to instruct the jury that a verdict of liability could be predicated only on a finding of knowing or reckless falsity in the publication of the Life article."

The text of the statute is reprinted as a footnote in the case. It is herewith reproduced for the purpose of comments thereon which will follow. The complete text of the *New York Civil Rights Law Par. 50-51* is as follows:

Par. 50. Right of Privacy

"A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor."

Par. 51. Action for injunction and for damages

"Any person whose name, portrait or picture is used within this state for advertising purposes of trade without written consent first obtained as above provided, may maintain as equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use, and if the defendant shall have knowingly used such person's name portrait or picture in such manner

as is forbidden or declared to be unlawful by the last section, the jury in its discretion, may award exemplary damages. But nothing contained in this act shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this act shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith."

Obviously, the New York statute deals solely with the unauthorized use of an actual person's name or photograph in advertisements or "for the purposes of trade". Notably, the Supreme Court observes that: ..."the statute gives him a right of action when his name, picture or portrait is the subject of a 'fictitious' report or article."(p. 384); nor does the Supreme Court find fault with permitting recovery under the statute providing that the trial judge properly charge the jury that: "... a verdict of liability could be predicated only on a finding of knowing or reckless falsity in the publication of the Life article."(p. 397)

To summarize Time, Inc. v. Hill, therefore, it appears that:

1. The right to privacy is recognized as a fundamental, personal, constitutionally protected privilege of man in our so-called free society.

2. The right to privacy includes personal authority over one's name or likeness so as to require his consent to publication thereof in any article not "hot news" or relating his involvement in a matter of "public interest" or "public concern"; however,

3. Even if the article involves a matter of "public interest" (such as the opening of a new play) WHERE IT CONTAINS UNTRUTHS WHICH ARE FICTITIOUS BUT NOT DEFAMATORY, if published without his consent and knowingly or with reckless disregard of the truth or falsity thereof, the person named, or portrayed (THOUGH HE WAS HISTORICALLY PROJECTED INTO AN AREA OF PUBLIC INTEREST SO AS TO THEN MAKE HIM AN INVOLUNTARY PUBLIC FIGURE) may recover damages from the publisher.

The present case is, of course, similar to *Time, Inc. v. Hill* ONLY in that:

1. The article complained of contained untruths.

2. The article complained of was published without consent, containing the names (and herein also likeness of plaintiff's family and home at their very worst.)

The present case is *unlike Time, Inc., v. Hill* in that:

1. Defendants actually INTRUDED into the Cantrell premises to take the photographs of plaintiff's infant children and of her home, without the invitation, knowledge or consent of plaintiff.

2. Defendant's fictionalized article, containing the names and photographs of plaintiff's children and her home, was HUMILIATING AND DEFAMATORY IN BOTH WRITING AND PICTURES, resulting in their extended emotional hurt and distress.

3. None of the children or the Cantrell home were historically in the news.

4. The occasion of publication was NOT RELATED TO A CURRENT, NEWSWORTHY EVENT, such as the opening of a play.

The Supreme Court remanded in *Time, Inc. v. Hill* because the District Court erred in giving its charge.

Counsel for respondents herein was gracious enough to observe that such error is absent in the within record.

It is respectfully submitted that under the charge of the District Court, the jury was more than warranted in finding that the defendant's intrusive invasion into the family privacy of Margret Mae Cantrell was reckless, and that the publication in its "hillbilly" theme containing distortions and untruths, was either agreed upon in advance by the editors, or at the very least was ratified and approved with reckless disregard as to the truth of the contents, only its attractiveness thereof as a "feature story" for its readers being the concern of the Sunday editor.

"Recklessness is an inference of fact to be drawn from the evidence offered, and is a matter for the determination of the jury, . . . "; 76 C.J.S. Reckless, Recklessly, Recklessness, p. 68.

Recklessness need not involve wanton or willful conduct; *Russell v. Turner,* 148 F.2d 562, 565; McCoy

v. Faulkenberg, 53 Ohio App. 98; *White v. Hall*, 118 W.Va. 85.

In note 7, page 383 of *Hill*, the Supreme Court pointedly observes that even though the publication's truth concerning a newsworthy event may be a defense under the New York statute as interpreted by the Supreme Court of Appeals of that State, nevertheless:

> "7. This limitation to newsworthy persons and events does not of course foreclose an interpretation of the statute to allow damages where "revelations may be so imitmate and so unwarranted in view of the victim's position as to outrage the community's notions of decency." Sidis v. F-R Pub. Corp., 113 F2d 806, 909 (C.A.2d Cir.) cert. denied, 311 U.S. 711 61 S.Ct. 393, 85 L.Ed. 462 (1940). Cf. Garner v. Triangle Publs., Inc., 97 F.Supp. 546, 550 (S.C.S.D.N.Y.1951); res Restatement, Torts, par. 867 comment d (1939). See Id., illust. 6. This case presents no question whether truthful publication of such matter could be constitutionally proscribed."

The jury was, of course, warranted in the within case in finding that the publication, added to and resulting from, the intrusive invasion of the Cantrell family privacy did indeed "outrage the community's notions of decency"; as witness the articles printed in the other newspapers expressing the community's outrage. (Plaintiff's Exhibit 7, App. II, p. 11)

The subliminal thinking of the Justices of the Supreme Court in *Time v. Hill* may well have been revealed in its instructive note 7, supra, setting forth a series of federal and state cases dealing with liability aspects in privacy cases. Where the "invasion" complained of is only by unauthorized use of a non-public

figure's likeness or name, it appears that the test of liability is whether the occasion, event or subject matter legitimately "concerns" the public. If legitimate public concern is lacking, even though completely true, the person named has a cause of action. The Supreme Court refers to *Afro-American Publishing Company v. Jaffe*, 366 F2d 649, wherein the Circuit Court of Appeals for the District of Columbia has (p. 653) alluded to the *Restatement of Torts, par. 867* which holds that a person "who unreasonably and seriously interferes with another's interest in not having his affairs known to others" is liable for invasion of the offended person's privacy. The Circuit Court further held that "An action is maintainable even when all statements made are completely true and accurate .... The right of privacy stands on high ground, cognate to the values and concerns protected by Constitutional guarantees", citing *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 wherein the Supreme Court pointed out that both the Fourth and Fifth Amendments are concerned with "constitutional values ... reflecting the concern of our society for the right of each individual to be let alone." ... and commenting that: "The Court also spoke in terms of 'the Constitution's concern for the essential values represented by our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life".

The District of Columbia Circuit Court cited "other references to the existence and importance of a zone of privacy established by constitutional guarantees" as *Mapp v. Ohio*, 367 U.S. 643; *Griswold v. Connecticut*,

381 U.S. 479; *DeGregory v. Attorney General of State of New Hampshire* 383 U.S. 825.

In Mapp, supra, a criminal conviction was reversed because the evidence was obtained by police officers in private premises without a lawful warrant.

In DeGregory, the Supreme Court cited its holdings in *Watkins v. United States*, 354 U.S. 178, 197 in the following:

> "The First Amendment may be invoked against infringement of the protected freedoms by law or by law making . . . . Investigation is a part of lawmaking and the First Amendment, as well as the Fifth, stands as a barrier to state intrusion of privacy . . . .There is no showing of "overriding and compelling state interest." . . . .that would warrant intrusion into the realm of political and associational privacy protected by the Fifth Amendment".

It is respectfully submitted, therefore, that the Supreme Court's footnoted reference embodied in note 7 in *Time, Inc. v. Hill* are intended as a reaffirmation of its strong advocacy of and protective interest in the right of privacy, with its "protected freedoms" indigenous to America; and in the evolving body of legal principals dealing with the equally sacred and protected freedom of man to utter and print his thoughts, since New York Times v. Sullivan, the High Court has no intention of undermining or weakening the foundation on which individual freedom must be built, one's right to be a truly "private citizen", unless history, circumstance, uncontrolled events or personal choice project him into the realm of legitimate public interest or concern.

Moreover, the Supreme Court in Time, Inc. v. Hill did not do what the defendant here suggests, i.e., disregard a proper jury verdict on a proper charge.

The First Amendment's guarantee of a free press is not intended for newspapers and magazines alone, of course, but is one of the fundamental rights of freemen as individuals; yet, where such right was used by obtrusive mail peddlers of erotic literature, without permission of the addressees, the Supreme Court, in the recent decision of *Rowan v. United States Post Office*, 38 U.S.L.W. 4343, unanimously upheld a statute authorizing such addressees to require that their names be omitted from the lists of the publishers. The Supreme Court held that the individual's right "to be let alone" completely outwieghs the mass-mailer's right to communicate.

VIII.

THE CRITICAL ISSUES OF TRUTH, OFFENSIVENESS, INTRUSIVENESS AND RECKLESSNESS ARE MATTERS FOR JURY DETERMINATION

Consent is a question of fact for the Jury's consideration. Schneckloth v. Bustamonte, 93 S.Ct. 2041. The jury here specifically found there was no consent to either the uninvited trespass or the publication.

The American Law Institute's Section 652D of its new provision for the invasion of privacy in Restatement (Second) of Torts, deals, inter alia, with "Publicity Given to Private Life", quoting as follows:

"One who gives publicity to matters concerning the private life of another, of a kind highly offensive to a reasonable man, is subject to liability to the other for invasion of his privacy." Tent. Draft No. 10 to 13, p. 113

To illustrate the principle, the following example is given:

"'A' publishes a book describing the life and peoples of a backwoods community. In this book 'A' portrays in detail the conduct and character of 'B', a woman living in the community and identified her by name. The book reveals intimate details as to 'B's peculiar appearance . . . (etc.) to which the ordinary reasonable woman would strongly object to having made public. 'A' has invaded the privacy of 'B'." Comment D, Illustration 11, p.115

Dean Prosser's example of what could constitute a cause of action, classically describes the Cantrell case. Moreover, his use of the term "highly offensive to a reasonable man" necessarily implies that, under proper charge of the Court, the fact finder must weigh the evidence on the issue of offensiveness.

Webster's unabridged, Twentieth Century Dictionary defines "news" as "recent happenings"; and "newsworthy" as "having the quality of news". Further, the word "happening" is defined as "something that happens"; and "happen" as "to occur or befall by chance or without plan". Under these definitions, the Cantrell story was not concerned with "news", and was therefore not "newsworthy" so as to come within any of the areas of qualified privilege suggested by the astute counsel for the respondents.

The testimony clearly established that the very concept of the offensive story was the suggestion of Eszterhas to his then doting editors; and the prominence (largest single article) in the defendant's Sunday feature magazine without even checking the Plain Dealer's "morgue" files for accuracy, was evidence that the only "happening" was the story itself, a well-planned and substantially fictional creation.

From the "Hill Folk" reference in the morgue file's burial account shortly after the tragedy, to the "We're hillbillies" subtitle under the photograph of William David Cantrell and his sister, in the 1968 feature article, Eszterhas characterized the Cantrells as backwoods, uncultured, preternatural human freaks who, in their withdrawn and limited development epitomized a community of freaks, bereft of human sensitivities and love – indeed "little to live for".

Apparently not satisfied with the factual accounts contained in the news stories of the disaster, and seeking a "more interesting" angle as the basis for his undertaking for profit, Eszterhas decided to "drop in" on the unsuspecting Cantrell family; and he struck what for him amounted to a bonanza. Mother Cantrell was away, so his invasion was uninhibited. The camera eye of the Plain Dealer's feature pages was filled with the unprepared and uncombed scenes of the private family; and personal details theretofore hidden in the Gallipolis Ferry hills, and protected from exposure only by the Cantrell's right to be "let alone" were published in about half a million Sunday *Plain Dealers.* With such evidence, the jury was amply fortified in its finding that the invasion was a complete trespass, and the

publication of the camera's ill-gotten products a very reckless act indeed.

In *Time, Inc. v. Ragano* 427 F2d 219, 221, the article complained of was a bona fide news story; but the Fifth Circuit Court of Appeals affirmed the District Court for the Middle District of Florida in denying the publisher's motion for summary judgement on lack of evidence of malice saying:

> "The record, which consists of affidavits, exhibits and depositions, shows that all of the Time staff knew that Ragano was an attorney from the "bio" files Time Inc., had on him." . . . "In view of the principle that all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion for summary judgment, e.g., United States v. Diebold, Inc., 1962, 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176; Gross v. Southern Ry. Co., 5 Cir. 1969, 414 F.2d 292, and in light of the fact that all the Time, Inc., employees knew that Ragano was an attorney, we think that a genuine issue of material fact exists as to whether Time's conclusion that Ragano could journalistically be referred to as a top Cosa Nostra hoodlum was made in good faith or with malice. Therefore, summary judgment was denied. Fed. R. Civ. p.56"

The foregoing decisions are in accord with the case of *Blount v. T.D. Publishing Corp.*, 423 F.2d 421 (N.M. 1967).

In that case the Court held:

> "Where the individual's right of privacy is concerned and where the right of the public to be informed is involved, the question of fact should be resolved by the trier of the facts."(p. 424)

IX.

THE VERDICT WAS NOT EXCESSIVE

Respondent's frank and uncompromising statement of accord with the charge based upon Time, Inc. v. Hill, suggests that the case be also a proper guide as to the measure of damages herein.

Although the Hills, made heroes in the article and in nowise defamed, asked compensatory and punitive damages only because they did not consent to the use of their names; the verdict for the husband was $50,000 compensatory and $25,000 in punitive damages. The wife received a verdict of $75,000 compensatory and $25,000 in punitive damages. The Cantrells by comparison were awarded only $45,000 and $15,000 each as compensatory damages, despite the trespass into their home, the extensive feature publication and the distress and humiliation caused thereby.

Obviously the plaintiffs were entitled by the Seventh Amendment to the Constitution to a jury trial; and the appellant's real complaint was with the jury's verdict. This in itself is no ground for either n.o.v. or for a new trial; *Simler v. Conner*, 372 U.S. 221; *Meeker v. Ambassador Oil Corp.*, 375 U.S. 160; *Fitzgerald v. United States Line Co.*, 374 U.S. 16; *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500; *Dick v. New York Life Ins. Co.*, 359 U.S. 437.

It is exclusively within the province of the jury as the fact finder to determine all of the issues which were submissible and upon which testimony was offered. Even were the Court to believe that evidence as to any of the factual issues was weak or slight, it would still lie

within the jury's exclusive province to judge, to accept or to reject such evidence; *Basham V. P.R.R. 372 U.S. 699; Rogers v. Missouri-Pacific Railroad, 352 U.S. 500; Lavender v. Kurn, 327 U.S. 645; Gallick v. Baltimore & Ohio Railroad, 372 U.S. 108; the Seventh Amendment to the Constitution.*

The strong mandate of the United States Supreme Court, as gleaned from its decision, which defines federal policy on questions of fact and credibility, leaves little discretion for a trial judge in this area, holding that such evidence must be submitted to the jury. Judge Friendly, in an opinion for the Second Circuit Court of Appeals in the case of *Herman Schwabe, Inc. v. United Shoe Mach. Corp.* 297 F2d 906, 912, cert. den. 369 U.S. 865 (1962) said:

> "There is no bright line that divides evidence worthy of consideration by a jury, although subject to a heavy counter-attack, from evidence that is not. Especially because of the guarantee of the *Seventh* Amendment, a federal court must be exceedingly careful not to set the threshold of the jury room to high."

Moreover, proof of special damages is not required where even a technical trespass is involved in obtaining information breaching privacy; Dietemann v. Time, Inc. 449 F2d 245, 247; Roach v. Harper, 143 W.Va. 869; Pearson v. Dodd, 410 F2d 701, cert. den. 395 U.S. 947.

X.

CONCLUSION

Wherefore, it is respectfully submitted that the Cantrell family, being neither public officials nor public figures, and their home and family life being exclusively their private property and rights, the physical intrusion into their home by the publisher's reporter and photographer constituted such trespass as to foreclose respondent's First Amendment rights to photograph and thereafter to publish even a true account of the facts; and that their false and fictionalized publication, stripped by the trespass of the protection of any privilege, under the circumstances, warranted the verdict and judgment of substantial damages. Accordingly, it is respectfully urged that the judgment of the United States Court of Appeals for the Sixth Circuit be here reversed and the judgment of the District Court reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the within brief to Smith Warder, Esq., attorney to for the respondents, to his office, 1144 Union Commerce Bldg., Cleveland, Ohio 44115, by direct mail, postage prepaid, this 25th day of July, 1974.

Harry Alan Sherman

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